thing that people have an eye to in buying land and the market price of the land is affected by it; such future utility must, however, be estimated by prudent business calculations and not by mere speculation and impractical imagination." (See *Ataul Huq* v. *Secretary of State*[8]). It is true that the opinions of experts are but opinions which may be accepted only when they are confirmed by the evidence. It is well established that the onus is upon the appellants to show that the awards made by the learned judge were wrong or inadequate. They have not adduced any evidence with regard to the potentialities of the lands acquired. On the other hand, I do not think that it requires an expert to see that because of their being bounded on three sides by rivers, this fact would pose difficulties in their future development, as distinct from their class as lands within a native reserve, the titles of which are by no means impossible to be converted into mixed zone titles. As was stated in the judgment of the Privy Council in *Vyricherla Narayana Gajapatiraju* v. *Revenue Divisional Officer, Vizagapatam*[9] at page 103: "The truth of the matter is that the value of the potentiality must be ascertained by the arbitrator on such materials as are available to him and without indulging in feats of the imagination."

It is for the appellants to show by evidence the potentialities for the lands acquired. Beyond stressing their proximity to certain areas of mixed zone land which were being developed on the material date, they have adduced no other evidence with regard to the matter. As has already been pointed out, proximity itself is no proper indication of potentiality as such. Accordingly, I am of the view that the appellants have failed to show that the learned judge was wrong when he agreed with the respondent in disregarding the developments which were carried out in Poh Kwong Park and Nanas Road West as being irrelevant. They have also failed to show that native reserve lands nearer such areas fetch higher prices than native reserve lands farther away, and that therefore there should be a differentiation made by the learned judge in his awards between native reserve lands situated nearer Poh Kwong Park and Nanas Road West areas, and native reserve lands located farther away. Accordingly, in my judgment, the first four grounds fail.

I now come to the last ground of appeal. This states that the learned trial judge, in making his awards, should have made a blanket award of $550 per acre for all the subject lands, and should then have enhanced the said blanket award of $550 per acre: (a) by giving allowance for the respective topography of the subject lands, and (b) by applying a multiplier of 1:3 (founded on the Government's awards on mixed zone lands of $4,000 per acre near Batu Kawa Road and $12,000 per acre near Poh Kwong Park and Nanas Road West areas) on the said blanket award of $550 per acre based on the situation of the subject lands from Batu Kawa Road and Poh Kwong Park and Nanas Road West respectively. Learned counsel for the appellants has submitted that the best basis for dividing the lands near Batu Kawa and those near the development area in Poh Kwong Park and Nanas Road West is to draw lines dividing them. I do not, with respect, think that this is a proposition justified by principle or authority and I need say no more about it. As to taking into account the topography of the lands acquired, this was duly done by the learned judge. With regard to the suggestion of applying a multiplier of 1:3 as referred to in this ground, all I need say is that to equate lands belonging to one class with lands classified under another class for the purposes of making awards under the Land Code in respect of land acquisition is wrong in principle and not supported by authority. There must be a stated accepted foundation for fixing a figure, otherwise an award would be defective as being an award made *ex vacuo* without a stated foundation. As was held in the *Collector of Land Revenue* v. *Alagappa Chettiar, supra*, land valuation inevitably involved an element of appreciation and impression. Therefore, an appellate court ought not to reject the judge's assessment and embark upon a fresh valuation of its own unless it was satisfied for good reasons that the judge's assessment must be wrong. In relation to this ground, the appellants have not succeeded in showing that for good reasons the learned judge's assessment must be wrong. Accordingly, this ground also fails.

The learned judge does not appear to have taken into account the difference in the conditions of title in respect of the lands acquired. Whereas the rest of the lands acquired were held under agricultural titles, Lots 65, 32, 28, 8, 23, 137 and 143 were held under open titles. It is common knowledge that, from the market value point of view, the latter type of titles has a financial advantage over the former type. I think that this should be reflected in the awards made. I am therefore of the view that, in respect of Lots 65, 32, 28, 8, 23, 137 and 143, an additional sum of $100 per acre should be added to the amounts awarded in respect of each of these parcels and the awards of the learned judge adjusted accordingly. Save to this extent, the appeal is dismissed. Each party to pay his own costs of the appeal.

Lee Hun Hoe C.J. (Borneo) and **Chang Min Tat F.J.** concurred.

Order accordingly.

Solicitors: *Chan, Jugah, Wan Ullok & Co.*

TONG LEE HWA & ANOR. v. MALAYAN BANKING BHD.

[F.C. (Lee Hun Hoe C.J. (Borneo), Ong Hock Sim and Chang Min Tat F.JJ.)
November 14, 1977 and January 25, 1978]

[Kuala Lumpur — Federal Court Civil Appeal No. 172 of 1976]

Practice and Procedure — Appeal — Notice of appeal filed within time but not served on respondent within time — Fault of clerk of solicitor — Application for extension of time to serve notice of appeal — Application dismissed — Federal Court (Civil Appeals) (Transitional) Rules, 1963, rr. 6, 7 and 13.

In this case the notice of appeal was filed within the one month specified in the rules but a copy of the notice was not served on the respondent at the same time. It was served some considerable time later. The failure was due to the fault of the solicitors' clerk. An application was made for extension of time to serve the notice of appeal on the respondent.

Held: an appeal could only be said to be brought when the notice of appeal was served on the respondent;

(2) when notice of appeal is filed with the court, a copy must at the same time be served on the respondents or their solicitors. Where notice was not served within time, the appeal was not properly brought before the Federal Court.

Cases referred to:-

(1) *Re a Debtor* [1910] W.N. 224.

(2) *Hendry* v. *De Cruz* [1949] M.L.J. Supp. 25.

(3) *Gurbachan Singh* v. *Seagrott & Campbell (No. 2)* [1962] M.L.J. 370.

(4) *Christopher* v. *Croll* (1885) 16 Q.B.D. 66.

(5) *Chin Hua Sawmill Sdn. Bhd.* v. *Tuan Yusoff bin Tuan Mohamed* [1974] 1 M.L.J. 58, F.C.

(6) *Tan Ting Kok* v. *Cheong Lep Keen & Anor.* [1969] 1 M.L.J. 153.

(7) *Ramanath & Ors.* v. *Ban Tsan Chuan* [1967] 2 M.L.J. 284, F.C.

FEDERAL COURT.

R.R. Chelliah for the appellants.

Too Hing Yeap for the respondents.

Chang Min Tat F.J. (delivering the judgment of the Court): On objection being taken to this appeal for failure of service, the appellants made an application by notice of motion to this court for extension of time to serve the notice of appeal on the respondent.

Notice of appeal was filed within the one month specified in rule 13 of the Federal Court (Civil Appeals) (Transitional) Rules 1963, but a copy of the notice was not served on the respondent at the same time as required by rule 7. It was served some considerable time later. The reason for the failure to serve was given by the clerk to the solicitors for the appellants that he had relied upon the court process-server to effect the service. It is not part of the duties of the Court Registry to perform this service and it is not argued that the failure was other than the fault of the solicitors' clerk. It is however tendered as an explanation.

The rules relevant to this appeal are:

"6(1). Appeals to the court shall be by way of re-hearing and shall be brought by giving notice of appeal.

....

7. Notice of appeal shall be served on all parties directly affected by the appeal or their solicitors respectively at the time of filing the notice of appeal. It shall not be necessary to serve parties not so affected.

....

13. No appeal shall, except by special leave of the full court be brought after the expiration of one month —

(a) ....

(b) in the case of an appeal against the refusal of an application, from the date of such refusal;

(c) in all other cases, from the date on which the judgment or order appealed against was pronounced:

...."

The special leave of the full Court of Appeal is required. The notice of motion did not however ask for this special leave. It asked merely for an extension of time to serve the notice of appeal on the respondent. The affidavits in support in addition to the explanation asserted that the respondent would suffer no prejudice which could not be compensated by way of costs.

It is accepted by Mr. R.R. Chelliah for the applicants that the default of a solicitor (*Re a Debtor*)[1] or a mistake of a solicitor's clerk (*Hendry* v. *De Cruz*)[2] would not be a ground for granting the special leave of the full Court of Appeal. If this is a case for special leave, he must fail. He argues however that he does not have to apply for this special leave. All he needs to do is to apply for ordinary leave and that is because having filed the notice of appeal in the Court Registry within time, he has sufficiently "brought" the appeal before the Federal Court for all the purposes of rule 6. His reasoning is that bringing an appeal up and serving the notice of appeal are two different matters.

Authority however is against him. The Court of Appeal in *Gurbachan Singh* v. *Seagrott & Campbell (No. 2)*,[3] which dealt with O.58 rr.15, 1A(1) and 2, Rules of the Supreme Court which are *in pari materia* with rules 13, 6(1) and 7, held that an appeal could only be said to be brought when the notice of appeal was served on the respondent. The case relied on by the Court of Appeal was the English case of *Christopher* v. *Croll*.[4] It is however urged by Mr. Chelliah that reliance on the English case was unsafe and the judgment of the Court of Appeal therefore erred since in England, the notice of appeal need not be served. But it seems to us by this argument that where there is a statutory requirement for service of the notice on the respondent, failure to serve must be a stronger argument for the conclusion that the appellants had not brought up the appeal within the requirements of the rules. With respect, we see no reason for departing from *Gurbachan Singh's* case, or from *Chin Hua Sawmill Co. Sdn. Bhd.* v. *Tuan Yusoff bin Tuan Mohamed*[5] which followed *Gurbachan Singh's* case.

There is further support for the rejection of Mr. Chelliah's contention in *Tan Ting Kok* v. *Cheong Lep Keen & Anor.*,[6] a decision of this court, which held that rules 6 and 7 of the Federal Court (Civil Appeals) (Transitional) Rules 1963 must be read together and when notice of appeal is filed with the court, a copy must at the same time be served on the respondents or their solicitors. On this interpretation, the Federal Court was of the opinion that where notice had not been served on the other side within time, the appeal had not been brought before it.

It may well be that consideration should be given whether the harshness of the rules which were copied from the pre-1909 English rules (see *Ramanath & Ors.* v. *Ban Tsan Chuan*)[7] should continue to apply in these days of greater leniency, but the application must on the rules in force be dismissed with costs. It follows that there is no appeal and it must be struck out.

Order accordingly.

Solicitors: *T. Tharu & Co.; Shook Lin & Bok.*